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TABLE OF CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 60

FEDERAL POWER COMMISSION, PETITIONER

v.

SUNRAY DX OIL COMPANY, ET AL.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit in Nos. 60, 61, and 62 (I R. 6696–6757[1]) is reported at 370 F. 2d 181. The opinions and orders of the

*Together with Nos. 61, 62, 80, 97, 111, 143, 144, and 231.

[1] The printed appendix in these consolidated cases will be prepared in four separately numbered volumes. In order to permit deferred printing of the appendix in accordance with this Court's new rules, the record references to the proceedings before the Commission refer to the pagination of the original Commission records in the separate proceedings in issue here. "I R." and "II R." will be the *Amerada* proceedings; "III R." and "IV R." the *Hawkins* and *Sinclair* proceedings, respectively. The parties have assigned the subsequent court proceedings pagination consecutive with the original Commission records, and that pagination is used herein.

Federal Power Commission in those cases (I R. 5778–5804, 6030–6038) are reported at 31 F.P.C. 623 and 1315.

The Tenth Circuit's *per curiam* order in Nos. 80 and 97 (II R. 6885–6891) and its *per curiam* order denying rehearing (II R. 6921–6925) are reported at 376 F. 2d 578. The opinions and orders of the Commission in those cases (II R. 6222–6230, 6426–6431) are reported at 36 F.P.C. 309 and 962.

The opinion of the Court of Appeals for the District of Columbia Circuit in Nos. 111, 143, 144 and 231 (IV R. 4290–4322) is reported at 373 F. 2d 816. The opinions and orders of the Commission underlying these cases (III R. 7288–7316; 7504–7508 and IV R. 4171–4193; 4281–4287) are reported at 34 F.P.C. 897 and 1330 and 34 F.P.C. 930 and 1357.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit in Nos. 60, 61 and 62 (I R. 6758) was entered on December 9, 1966. The petitions for writs of certiorari were filed on March 9, 1967.

The judgments of the Court of Appeals for the Tenth Circuit in Nos. 80 and 97 (II R. 6892–6902) were entered on March 27, 1967. The petitions were filed on April 5 and April 18, 1967, respectively. The Tenth Circuit's order denying rehearing (II R. 6921–6925) was entered on May 18, 1967.

The judgment of the Court of Appeals for the District of Columbia Circuit in Nos. 111, 143, 144 and 231 (IV R. 4323) was entered on February 7, 1967. The petition in No. 111 was filed on April 26,

1967. The petitions in Nos. 143 and 144 were filed on May 8, 1967. An order was issued on May 11, 1967, extending the time for filing the petition in No. 231 until June 8, 1967, when it was filed.

Orders were entered granting certiorari in all nine cases on October 9, 1967 (I R. 6926, 6927, 6928, II R. 6929, 6930, IV R. 4326, 4327, 4328, 4329). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion for the Federal Power Commission, in ascertaining the "in-line" prices at which producers' sales of natural gas should be certificated pending the determination of just and reasonable rates, to consider evidence of prices not yet permanently certificated where (a) the Commission found that a satisfactory appraisal of the contemporaneous conditions of the market required some reference to such data and (b) the Commission substantially discounted the probative value accorded the data.

2. Whether the Commission properly exercised its power to order refunds of the difference between rates in force under a producer's temporary certificate of public convenience and necessity and the in-line price later established, after public hearing on the application for a permanent certificate, where it appeared (a) that the temporary certificate had no express provision warning of the possibility of a refund order, but (b) that the refund order caused no detriment resulting

from justifiable reliance on the absence of such an express provision.

3. Whether it was an abuse of the Commission's discretion to reject a claim of the New York Public Service Commission that there was no need for some of the gas in issue here (a determination based primarily on the F.P.C.'s conclusion that this was a matter more appropriate for consideration in proceedings involving regulation of the pipeline-purchasers).

STATUTE INVOLVED

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, provides in pertinent part as follows.

Section 7(c), 15 U.S.C. 717f(c):

> No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *. [T]he Commission shall set the matter for hearing and shall give reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may

issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate * * *.

* * * * *

Section 7(e), 15 U.S.C. 717f(e):

* * * [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the * * * sale * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of [the Act] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed * * * sale, * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT

In three separate proceedings under Section 7 of the Natural Gas Act—one for each of three pricing districts in the Texas Gulf Coast Area—the Federal Power Commission considered the applications of numerous independent natural gas producers for permanent certificates of public convenience and necessity. The applications related to sales which, for the

most part, had already been initiated under temporary authorizations[2] issued on the basis of claimed emergencies and without notice or hearing.[3] The principal factual controversy in each case concerned the "in-line" price at which the gas could be sold (see *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (*Catco*)) pending the establishment of just and reasonable rates under Sections 4 and 5 of the Act.[4]

After appropriate proceedings, the Commission issued final decisions, granting the permanent certificates on condition that the producers charge no more than specified in-line prices. In determining what prices were in-line, the Commission considered prices at which other permanent certificates had been issued. The Commission, however, also gave consideration to prices of other sales that had not yet been finally certificated.[5] The Commission required the producers

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[2] Most temporary certificates were issued at the price the applicant had proposed. Where the proposed price exceeded 18 cents per Mcf, a provisional guideline price the Commission had previously established as the ceiling above which no sales would be certificated, the Commission required a reduction to 18 cents. Each temporary certificate expressly recited that the price therein was accepted for temporary service only, and that acceptance did not constitute approval of any rate or charge (*e.g.*, I R. 4147).

[3] The criteria and procedures pertinent to temporary authorizations are set forth in Federal Power Commission Regulations under the Natural Gas Act, Section 157.28, 18 C.F.R. 157.28.

[4] Such rates are to be established in the *Area Rate Proceeding (Texas Gulf Coast)*, F.P.C. Docket No. AR 64-2, now under submission to the hearing examiner.

[5] Included among such sales are those that were permanently certificated in the instant proceedings.

in one case, as a further condition of its grant of authority, to refund most of the charges collected under the temporary certificates exceeding the in-line rates fixed in the permanent certificates. In two proceedings, the Commission declined to consider in detail a contention of the New York Public Service Commission that there was no need for the gas in question.

Petitions for review of the District 4—or *Amerada*—decision were consolidated in the Tenth Circuit. That court upheld the pertinent in-line price condition against both producer claims that the price was too low and consumer charges that it was too high. The Tenth Circuit ruled, however, that the Commission had no power to order refunds for past periods because the temporary certificates had not stated expressly that refunds might be required.

Review with respect to Districts 2 and 3—the *Sinclair* and *Hawkins* decisions—was in the District of Columbia Circuit. That court concluded that the Commission had erred in setting the in-line prices by considering prices that had not been permanently certificated. In addition, the District of Columbia Circuit found that the Commission had abused its discretion by not giving greater consideration to the question of need. The refund question was not at issue.

This Court has granted nine petitions for certiorari seeking review of various aspects of the two appellate decisions, and it has consolidated the cases.

In Nos. 60 and 80, the Commission seeks review of the Tenth Circuit's decisions restricting its power to

order refunds. In Nos. 61, 62, and 97, a number of eastern distributors and the Public Service Commission of New York (the "seaboard interests") have petitioned for review of both that refund question and the Tenth Circuit decision that the District 4 in-line price was properly determined.

The Commission also has asked review (No. 144) of the District of Columbia decision that nonpermanent prices should not have been considered in establishing in-line prices for Districts 2 and 3. Various producers sought review of this question (Nos. 111 and 144), and some have also asked (Nos. 143 and 231) this Court to review the decision that the Commission should have considered more fully the need for the gas.[6]

I. THE *AMERADA* PROCEEDING

On September 28, 1960, the Commission issued its Statement of General Policy 61-1, 24 F.P.C. 818,[7]

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[6] A number of related petitions are presently pending. No. 82 is a conditional cross-petition (see *infra*, p. 10, n. 10) from the Tenth Circuit's *Sunray* decision at issue in Nos. 60, 61 and 62. Nos. 227, 415 and 516 seek review of the Tenth Circuit's "no refund" ruling in *Pan American Petroleum Corp.* v. *Federal Power Commission*, 376 F. 2d 161. Nos. 504, 520, 526 and 628 involve similar price, refund, and need issues, as to all of which the Fifth Circuit affirmed the Commission in *Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510.

[7] The Statement of Policy was promulgated concurrently with the issuance of the Commission's decision in *Phillips Petroleum Co.*, 24 F.P.C. 537, affirmed *sub nom. Wisconsin* v. *Federal Power Commission*, 303 F. 2d 380 (C.A.D.C.), affirmed, 373 U.S. 294. One point decided in *Phillips* was that regulation of independent producers would be facilitated by the establishment of area rates. To implement the area rate approach, the Policy Statement designated twenty-three pricing areas, includ-

establishing an 18 cent per Mcf ceiling upon the initial price at which future sales in District 4 would be certificated. *Skelly Oil Co.*, 28 F.P.C. 401,[8] issued on August 30, 1962, determined an in-line price of 15 cents per Mcf for District 4 sales contracted prior to September 28, 1960. Concurrently with the *Skelly* opinion, the Commission also amended Statement of General Policy 61-1 to reduce the District 4 ceiling price from 18 cents to 16 cents per Mcf. The Commission set the *Amerada* proceeding to determine what the in-line price should be for thirty-five sales of gas contracted during the period between September 28, 1960, and August 30, 1962.

The Commission, on March 23, 1964, entered the first of the orders here under review (Opinion 422; I R. 5769-5804). It found that the in-line price for the period was 16 cents per Mcf. It rejected both the seaboard interests' contention that the Commission must set the in-line price at the 15 cent per Mcf level applied to sales occurring before September 28, 1960, and the producers' claim that the Commission must accept any producer-established price within the 18 cent ceiling

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ing the three Texas Railroad Commission Districts involved here. With exceptions not important here, the Statement announced two ceiling prices for each area—one relating to certification of new sales and the other defining the level at which the Commission would suspend, under Section 4(e) of the Act, producer-initiated increases of prices for existing sales.

[8] *Skelly* was affirmed in part and remanded in part *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (C.A.D.C.), certiorari denied *sub nom. Prado Oil & Gas Co. and Skelly Oil Co.* v. *Federal Power Commission*, 377 U.S. 963.

set by the Policy Statement of that date. It ruled that the in-line price should reflect "current conditions in the industry" as measured by the price level at which substantial volumes of gas were moving in interstate commerce (I R. 5783-5784).[9]

The principal evidence was an exhibit sponsored by the FPC staff (I R. 1600-1625) showing the prices for comparable District 4 sales contracted between January 1, 1955, and August 31, 1962, at a price of 14 cents or greater.[10] In arriving at the 16-cent line, the Commission compared the prices in contracts entered into during the two-year tenure of the 18-cent ceiling with prices in comparable contracts entered into during the two-year period preceding promulgation of that guideline. The Commission thought it necessary to include in this analysis nonpermanent prices, such as those governing sales under temporary certificates, because only a small percentage of the gas contracted for after the

[9] The test was first announced in *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, 823 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co. and California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881.

[10] The examiner excluded evidence of producer costs and economic trends (I R. 5085-5107). The Commission affirmed and the District of Columbia Circuit dismissed a petition for review as premature. *Texaco Inc.* v. *Federal Power Commission*, 329 F. 2d 223, certiorari denied, 375 U.S. 941. The Tenth Circuit approved the ruling (I R. 6707-6710). Texaco's conditional cross-petition in No. 82, this Term, seeks review of the exclusion of the cost evidence if this Court holds improper the Commission's consideration of nonpermanent prices. As this Court decided in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 227, n. 3, exclusion of such evidence is appropriate.

Policy Statement was moving at permanently certificated prices (I R. 5787):[11]

> We are, of course, aware that "the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged." We, therefore, cannot and do not find that the 17.2-cent contract price average is the "in-line" price. However, a blind application of the doctrine that if a certificate application is challenged no weight can be given to the contract price in determining the price line would leave the Commission without substantial evidence on which to base its decision. We believe that the fact that the great bulk of the gas moving in interstate commerce in the area during this period was contracted for and temporarily authorized at initial rates between 16 and 18 cents per Mcf must be considered in fixing the "in-line" price for this period. * * *

The evidence showed that the weighted average price of pre-Policy Statement contracts had been 16.5 cents per Mcf, whereas the comparable average price for the later period was 17.176 cents per Mcf (I R. 5786). The Commission concluded that these figures indicated an upward shift in the line. But, because the contract prices were subject to downward revision by Commission action on requests for certification, either temporary or permanent, the Commission relied

[11] The permanently certificated sales shown in the staff exhibit accounted for 355,000 Mcf (I R. 5781) as opposed to total sales of over 3,200,000 Mcf (I R. 5785).

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on them mainly to establish that the price level had risen.

Observing that 82 percent of the gas sold pursuant to contracts executed during the post-Policy Statement period was at least 16 cents per Mcf (I R. 5786), the Commission explained (I R. 5789):

> In the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications. * * * The record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question was 16 cents per Mcf. While there is evidence that points in the direction of a higher price we believe the teachings of CATCO require that we draw the line at the lowest reasonable level. It is, therefore, our considered opinion, and we so find, that the price required by the public convenience and necessity for these sales is 16 cents per Mcf * * *.

In light of the then-recent decision in *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (C.A.D.C.), that equitable considerations might warrant a refund even though the temporary certificate had not contained an express refund condition, the Commission deferred, for further briefing, the allowance of refunds [12] of amounts

[12] The refund question was first raised at the commencement of the hearing before the examiner when, in response to the queries of the seaboard interests and other intervenors (I. R. 65–81), the producers asserted that refunds could not be

collected pursuant to temporary certificates that had authorized prices above 16 cents per Mcf but had not referred to refunds.[13] Then, in a second decision (Opinion 501; II R. 6222–6230), it ruled that a balancing of equitable considerations required refunds of such amounts, less relatively minor amounts of royalties and unrecoverable State production taxes.

The Tenth Circuit, on review of the first order, affirmed the in-line price determination. After reviewing the Commission's analysis, the court stated (I R. 6727–6728):

> [I]n the case at bar the Commission was confronted with a difficult situation. CATCO tells it to hold the line. The Ninth Circuit UGI decision says that the price line is intended to reflect current conditions and that the prices on which it is based must be those under which substantial quantities of gas move in interstate commerce. Various decisions warn against the use of suspect prices. Because of objections to most pertinent certificate applications, the number of permanent certificates available for comparison purposes represents only a meager amount of gas. The Commission took due note of all factors and concluded that the price required by public convenience and necessity

ordered with respect to temporary certificates not having express refund provisions (I R. 87–90). The Commission denied (I R. 5305–5311) an intervenors' motion (I R. 5060–5068) that the temporary authorizations be vacated or amended so as to impose an express refund condition.

[13] In the relatively few instances in which amounts in excess of the in-line price had been collected pursuant to temporaries that contained "express" refund conditions, the Commission required that refunds be made without delay (I R. 5795).

is 16 cents. We believe that in so doing the Commission acted reasonably and that "we owe it the same deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation. * * *" [Footnotes omitted.]

On review of the Commission's second, or refund, decision the court set aside the agency order (II R. 6885–6891) on the theory that the Commission could not order refunds in the absence of an express refund condition in the temporary certificate.[14] Thus, it did not reach the producers' contentions that the Commission's balancing of the equities was improper.

II. THE *SINCLAIR* AND *HAWKINS* PROCEEDINGS

Sinclair and *Hawkins* were separate proceedings involving sales in Texas Railroad Commission Districts Nos. 2 and 3, respectively. Each proceeding involved both pre- and post-Policy Statement sales. The producers were seeking approval of their contract prices with the pipeline purchasers—which were as high as 20 cents per Mcf. The seaboard interests urged

[14] The court, in its first opinion, reviewed and disapproved the Commission's refund order, concluding there had been error in deferring the refund question, because of a lack of power to decide it. The petitions in Nos. 60, 61, and 62 sought review of this aspect of the first Tenth Circuit decision. Those in Nos. 80 and 97 related to the second decision, which upset the refund order the Commission ultimately entered. Since the petitions have all been granted, there is no remaining question in this Court as to the propriety of the Tenth Circuit's review in its first decision of the Commission's power to direct refunds. (See the petition in No. 60, at pp. 7–8, n. 6.)

that no sales should be certificated at a price in excess of 15 cents per Mcf in either district.

The Commission adopted neither approach. It began by dividing all of the sales in question into two groups: those based upon contracts executed prior to September 28, 1960, the date of Statement of General Policy No. 61–1, *supra,* and those based upon contracts executed after that date. The Commission determined that for sales antedating the Policy Statement the in-line prices were 15 cents in District 2 and 16 cents in District 3. For subsequent sales, however, it fixed a 16 cent in-line price in District 2 and 17 cent in-line price in District 3.

In *Sinclair,* about 60 percent of the gas flowing under comparable contemporaneous contracts had not been permanently certificated. The Commission therefore made some use of evidence of nonpermanent prices. Chairman Swidler explained (IV R. 4180):

> The permanently certificated prices reflect only a part of the market activity in the post-policy period. Permanent certification is granted only where the proposed price is within the applicable guideline price, and where there is no contest by any interveners. Thus to limit the consideration to permanent certificates would permit a price freeze and would render the hearing in this proceeding meaningless. The pre-policy price would automatically control because almost all contracts above 15.0 cents were contested.

At the time of the hearing the producers and the pipeline purchasers had experienced more than three years of doing business under the

> provisions of Statement of General Policy No. 61-1, and their transactions under temporarily certificated prices constituted a heavy and significant percentage of all jurisdictional sales in District No. 2. To the extent that "the price line is intended to reflect *current* conditions in the industry," *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, 824 (CA 9), the determination of an in-line price calls for a scrutiny of all pertinent sales activity, whether under permanent or under temporary certification. See *Hassie Hunt Trust, Operator, et al.*, Opinion No. 412, 30 FPC 1438, 1442–1443 (1963). We therefore approve the Examiner's action in giving consideration to the temporarily certificated sales.

He further pointed out (*ibid.*) that, although nonpermanent contract prices "should not be given primary consideration," such prices "do show economic trends in the area and are entitled to some weight."

In seeking, on these premises, to determine "current conditions" in District 2 (IV R. 4180), the Commission noted that the majority of the post-Policy Statement gas was being sold at prices in excess of 16 cents per Mcf (IV R. 4181) and over 40 percent was at 18 cents per Mcf (IV R. 4178). Because of the large volume at these higher prices, the Commission concluded there had been at least a one cent upward shift in prices, and set the in-line price at 16 cents per Mcf for post-Policy Statement sales.

In *Hawkins*, the Commission fixed the 16 cent pre-Policy Statement price on the basis of a record that showed a concentration of over fifty percent of the permanently certificated volumes between 16 and 16.2

cents per Mcf (III R. 7294). It noted that it had found the same price line on the basis of similar records in *Texaco Seaboard Inc.,* 29 FPC 593, and *Hassie Hunt Trust, et al.,* 30 F.P.C. 1438, affirmed *sub nom. Continental Oil Co.* v. *Federal Power Commission,* 378 F. 2d 510 (C.A. 5).[15]

Because permanently certificated sales accounted for 70 percent of the total relevant post-Policy Statement volumes in the *Hawkins* District (III R. 1438–1442; cf. III R. 1417–1418, 1447; see III R. 7294), the Commission was able to place greater reliance upon trends discernible from an examination of such sales. It noted that the weighted average price for such sales was 16.17 cents per Mcf (III R. 7295), almost exactly one cent higher than the comparable figure—15.16 cents—for permanently certificated sales in the pre-Policy Statement period (*ibid.*). Three sales at 18 cents per Mcf reflected about 40 percent of the total volumes under permanent certificate (III R. 7295). Relying essentially on these factors, but giving "some weight" as well to nonpermanent prices, the Commission concluded that the District 3 price line had risen a cent to 17 cents per Mcf.[16]

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[15] The review proceedings in *Continental* involved two separate Commission orders. The pending petitions for certiorari (Nos. 504, 520, 526 and 628, this Term), which seek review of the *Continental* decision, see p. 8, n. 6, *supra*, do not question the validity of the order in *Hassie Hunt Trust.*

[16] As in *Amerada*, the Commission postponed determination of the refund problem (III R. 7304). Refunds were later ordered in *H. L. Hawkins & H. L. Hawkins, Jr. (operator)*, 36 F.P.C. 149. Review of the order is pending *sub nom. Skelly Oil Co., et al.* v. *Federal Power Commission* (C.A. 10), Nos. 9220, *et al.*, and is being held in abeyance to await this Court's

The Court of Appeals for the District of Columbia Circuit sustained the Commission's determination of the 16 cent in-line price in District 3 for sales antedating the Policy Statement. (The District 2 determination for that period was unchallenged.) However, it agreed with the seaboard interests that the Commission should have confined its inquiry into appropriate in-line prices for the later period to an examination of prices at which sales had been permanently certificated, and accordingly remanded the proceedings to the Commission for a redetermination of in-line prices. Noting that the Court of Appeals for the Tenth Circuit had recently approved the Commission's similar approach in *Amerada* the court distinguished that case on the ground that there no appreciable volume of gas had been permanently certificated, and stated, "* * * we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case" (IV R. 4312). The court recognized "that our decision may cause the in-line price to be frozen temporarily during the interim period [prior to a] * * * rate determination under § 4 or § 5 of the Act," but said "[t]his kind of freeze seems to be required by the logic of CATCO and in-line pricing." (IV R. 4314.)

On the "need" issue, the court held (IV R. 4293–4301) that the Commission had not adequately explained its rejection of the contentions of the New York Commission that there was no public need for

decision of the present case. In *Sinclair* the refund question is pending before the Commission (IV R. 4191).

the gas involved in the *Sinclair* and *Hawkins* proceedings.

SUMMARY OF ARGUMENT

I

Price is an element of the public convenience and necessity. Moreover, the price allowed as a result of a Section 7 (certification) proceeding is apt to govern until such time as there may be a full-scale rate inquiry under Section 4 or 5 of the Act (a period which may well extend for several years). The Commission's essential duty in passing upon the applicant's initial price is to evaluate market conditions and, in this light, to assay a reasonable approximation of the fair price for the gas—a figure that will presumably elicit continuing supplies for the interstate market, yet protect against the danger of excessive and inflationary price proposals by dominant suppliers.

All of the instant certification proceedings involve the Commission's efforts to determine, in designated producing areas, whether proposed prices would be "in line". The problem was complicated, in the Commission's view, by the fact that very significant amounts of gas were being sold in these areas under temporary authorizations—that is to say, under arrangements which had not received the screening which is provided in Section 7 proceedings that look to permanent certification. Yet, the Commission was persuaded that, in the circumstances of each case, some sales at nonpermanent prices were probative to some degree of contemporaneous conditions, and that a satisfactory appraisal of the price line could not be

made on a record that wholly excluded such data from the process of determining whether a proposed price is in or out of line.

Because of the differing circumstances reflected in each record, the Commission's manner of considering the nonpermanent data, and the weight given them, varied from case to case. In each proceeding, however, there is substantial support for both the Commission's decision to make use of these data, and the limited probative value attached to the data. We contend, therefore, that the Commission did not abuse its discretion in making a carefully circumscribed use of the challenged evidence.

II

The Commission has authority to order refunds of amounts collected at temporarily authorized prices that prove to exceed the in-line price established in a permanent certificate of public convenience and necessity. There is no sound basis for the Tenth Circuit's holding that the absence in a temporary certificate of an express allusion to the possibility of refunds necessarily makes inequitable a Commission order directing refunds of such excess amounts. Here, the producers were given the opportunity to show that they justifiably relied to their detriment on the absence of such an express provision. They were able to show only a limited detriment, in the payment of royalties and State production taxes, and those expenditures were excluded from the ambit of the Commission refund order. On such a record there is no element of inequity in ordering

a refund; and the absence of refunds would mean that the consuming public is the loser to the extent that it paid out-of-line prices while gas was flowing under temporary certificates issued in response to *ex parte* producer contentions that they would otherwise suffer uncompensated losses of their gas reserves.

III

The New York Public Service Commission did not show that there was no need for some of the gas in issue here, but claimed that the burden of demonstrating pipeline need was on the producers. The Commission, however, regularly considers the supplies and needs of pipelines in proceedings and other activities that focus on a particular pipeline and *all* of its suppliers and customers. In these circumstances, it was not an abuse of discretion for the Commission to decline to give more detailed consideration to the New York arguments in the context of producer certification proceedings.

ARGUMENT

I. THE RELEVANT DETERMINATIONS OF IN-LINE PRICE ARE BASED UPON EVIDENCE OF CURRENT CONDITIONS APPROPRIATE TO THE PURPOSE AT HAND

A prime function of certification proceedings under Section 7 is to implement "the purpose of the Natural Gas Act * * * to underwrite just and reasonable rates to the consumers of natural gas." *Catco, supra,* 360 U.S. at 388. But, as this Court there recognized it is not practical for the Commission, in a Section 7 proceeding, to make the detailed studies of costs and other considerations that enter into determination of the just

and reasonable price. *Id.* at 391. Consequently, *Catco* directs the Commission to condition issuance of permanent certificates upon producer acceptance of in-line prices "so * * * that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act." *Id.* at 392.

The essence of the problem is how to determine the price line (which will govern for an interim period) in a manner that is reasonable and fair, while avoiding the protracted proceedings that inevitably accompany the determination of just and reasonable rates. The Commission has evolved an approach to this problem that finds its origins in the Ninth Circuit decision in *United Gas Improvement Co.* v. *Federal Power Commission,* 283 F. 2d 817, 824, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.,* and *California Co.* v. *United Gas Improvement Co.,* 365 U.S. 879 and 881, and several other courts of appeals' decisions.[17] In *Callery* this Court described the procedure as follows (382 U.S. at 227):

> Consumer protection is afforded by keeping the "in-line" price at the level where substantial

[17] *Public Service Commission of New York* v. *Federal Power Commission,* 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York* and *Shell Oil Co.* v. *Public Service Commission of New York,* 365 U.S. 880 and 882; *United Gas Improvement Co.* v. *Federal Power Commission,* 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.,* 368 U.S. 823; and *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F. 2d 147 (C.A. 5),

> amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way "suspect." * * *

The refinements of the problem presented here are rooted in circumstances which were not before this Court in *Callery* or the Ninth Circuit in *UGI:* in *Amerada* the record showed that approximately 90% of the gas was entering the market under temporarily certificated prices; in *Sinclair* and *Hawkins,* although more gas was being sold under permanent, unreviewable certificates (40% and 70%, respectively), it was the Commission's judgment that a considered appraisal of current market conditions again required some reference to sales being made under temporary authority.

The Tenth Circuit, in its decision now before this Court, and the Fifth Circuit in *Continental Oil Co.* v. *Federal Power Commission,* 378 F. 2d 510, agreed with the Commission that it could, in such circumstances, give some consideration to prices not yet permanently certificated. The District of Columbia Circuit, on the other hand, has held that the Commission may not refer to such prices.

We suggest that the District of Columbia Circuit's decision would have two related consequences inconsistent with the objectives of an in-line price determination: its rule would generally fix the price line at the level found in the first certification proceeding in

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certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co,* 366 U.S. 965; *California Oil Co., Western Division* v. *Federal Power Commission,* 315 F. 2d 652 (C.A. 10); *California* v. *Federal Power Commission,* 353 F. 2d 16 (C.A. 9).

a particular area; and the Commission would lose the ability to give even limited consideration to the changing conditions under which the producers offer gas to the pipelines.

A. THE COMMISSION SHOULD HAVE DISCRETIONARY AUTHORITY TO CONSIDER NONPERMANENT PRICES AS EVIDENCE OF CONTEMPORANEOUS CONDITIONS, IF THE EVIDENCE IS RECOGNIZED AS HAVING APPROPRIATELY DIMINISHED PROBATIVE FORCE

In cases presenting questions of the proper price line, the Commission has, since 1960, taken as its touchstone the Ninth Circuit's extensive discussion of the problem in *United Gas Improvement Co.* v. *Federal Power Commission, supra* ("*UGI*"). The Ninth Circuit holding was (283 F. 2d at 824):

> [T]he price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. * * *

The Ninth Circuit also held that some "suspect" prices—*i.e.,* those still subject to Commission or court review—should not form the basis for setting the "in-line" prices.

In cases such as *Amerada* and *Sinclair,* the Commission can either refer to "contemporaneous" prices "where substantial amounts of gas have been certificated to enter the market," or it can restrict its examination to prices "no longer subject to judicial review or in any way 'suspect.'" See *Callery,* 382 U.S. at 227. But it cannot follow the suggestion inherent in *Callery* and *UGI* that it do both.

The Commission has therefore taken what, in its judgment, is a middle course—considering, to some extent, nonpermanent prices as giving some indication of the current conditions; but, at the same time, taking account of the reasons underlying the "suspect price" doctrine by substantially discounting the probative value of prices that have not been permanently approved.

In doing so, the Commission has attempted to apply the essential rationale of the Ninth Circuit's decision. *UGI* involved challenges to Commission reliance on two types of price data: (1) "certificated prices [that] for the most part [had] never been subjected to Commission scrutiny" (283 F. 2d at 823); (2) prices subject to litigation pending before the Commission or courts. The Ninth Circuit found an abuse of discretion in reliance on the latter evidence. *Id.* at 824. It held, however, that the former type of prices could be considered, so long as they were not similar to those under court review.

In approving consideration of "prices not previously scrutinized," the Ninth Circuit gave paramount consideration to the need to base price line determinations on current conditions. The court noted that a failure to consider the prices not theretofore scrutinized "could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today." *Id.* at 824. To exclude the evidence would, in the court's view have created the risk of an in-line price at which the pipeline would have been unable to compete for reserves at fair, prevailing prices.

The Commission's view in the cases at bar was that a total exclusion of nonpermanent prices would have made unattainable the objective set forth in *UGI*: making certain that determinations of the line are a fair reflection of the price a pipeline must pay at a given point in time to persuade a producer to make gas available to the public. The contrary approach—ignoring all nonpermanent prices—would make no allowance at all for changing economic conditions in the market, and would necessarily freeze the price level at the first in-line determination for a given area, unless the Commission received the cost evidence that *Callery* recognizes would unduly prolong the proceedings.

The District of Columbia Circuit recognized as much, but found that this was the proper result. The opinion asserts that rejection of evidence of current conditions is required by *Catco* and *Callery*. The conclusion, said to follow from this Court's holding that cost and other evidence of the just and reasonable price may be excluded from Section 7 proceedings, was: "[i]f the courts and the FPC will not allow consideration of evidence which shows what the current conditions are, then temporaries and contract prices should not be accepted on the basis that they reflect current conditions." (IV R. 4313). This, however, misconceives the reason for excluding cost evidence from Section 7 proceedings. The exclusion is not based on a judicial direction that current conditions are to be ignored. On the contrary, *Callery* expressly recognizes that the in-line determination is to be based on a study of "*contemporaneous* certificates" (382 U.S.

227; emphasis supplied). The justification for proceeding without a presentation of cost evidence is simply the need to expedite the determination of the price line. The problem is not how to exclude reference to current conditions, but how to give those conditions proper weight without the burdens and delays characteristic of a full-scale rate proceeding.

The District of Columbia Circuit also asserted that, except for a producer's ability to file an increased rate under Section 4 of the Act (which, in turn, could be suspended and subjected to a full-scale rate inquiry), "This kind of freeze seems to be required by the logic of *CATCO* and in-line pricing" (IV R. 4314). But it is not an answer that Section 4 leaves room to file for increased rates. An artificially low in-line price not only would be unfair to producers, but it would also fail to implement the interests of the ultimate consumers. One of the primary purposes of in-line pricing is to discourage increased-rate filings, which could well have the untoward effect of eliminating price stability from the market.[16] Such filings, moreover, are subject only to a relatively brief suspension. At best the consuming public would be relegated to retrieving the excess charges through refunds many years later—a remedy that this Court has recognized as less than wholly satisfactory. *United Gas Improvement Co.* v.

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[16] As we noted in our brief in *Callery* (Br. in Nos. 21 *et al.*, October Term, 1965, pp. 17–19, and n. 11), experience has shown that the vast majority of producers whose initial rates have been reduced to the in-line price level have voluntarily chosen to continue operating at that level despite contractural and certificate authority to file higher rates.

Callery Properties, Inc., 382 U.S. 223, 230; *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524, and *Federal Power Commission* v. *Tennessee Gas Co.*, 371 U.S. 145, 154–155.[19]

We submit that the better rule is to allow the Commission some flexibility in the matter—some room within which to exercise its expert judgment [20] in evaluating the best available evidence of current conditions. Of course the Commission must exercise due care in deciding when to utilize nonpermanent prices, and the weight to be given them. Such an approach

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[19] The Commission's experience, moreover, was that pipeline rate increases, which faced the Commission at the start of the 1960's, were in large part triggered by producer rate filings. The pipeline increases normally exceeded the increase in purchased gas costs.

[20] We note that the District of Columbia Circuit is apparently willing to give the Commission such discretion at least with respect to some prices that are in some way suspect. The seaboard interests contended below that the Commission should not have considered certain permanently certificated prices, which were claimed to be "tainted," by reason of their having been based on other prices that were allegedly "incorrectly certificated in light of *Catco* and the subsequent court cases.'" Although the court of appeals thought re-examination of such prices "sometimes * * * may be wise" it nonetheless concluded that FPC may give weight to permanently certificated prices "that were certificated under standards later changed by the courts" (IV R. 4315).

We by no means disagree with this conclusion; we contend that it is correct. But we submit that it is anomalous to say that prices decided under incorrect standards may be considered, although prices not yet adjudicated must be excluded. Each for different reasons is "suspect." Each, in proper circumstances, and appropriately discounted, has been considered by the Commission. Because, as we shall show, that discount properly avoided the dangers attendant upon the use of "suspect" prices, that action should be upheld as a proper exercise of administrative authority.

would be fair to consumers and producers alike. At the same time the impetus to price instability would be largely removed; there is little incentive to propose increases which would be seriously out-of-line when that carries with it the prospect of refunds with interest at a point further down the road.[21]

B. THE RECORD IN EACH PROCEEDING SHOWS THAT THE COMMISSION WAS WARRANTED IN ITS LIMITED USE OF NONPERMANENT PRICES

In each of the three proceedings at issue here, the Commission determined in-line prices for the period after September 28, 1960. In making its decisions, the Commission took as its starting point the in-line prices it had set for the immediately preceding period—prices which are not now challenged as being too high.[22] In each instance, the Commission imposed upon the producers the burden of showing a justification for any increase. Ultimately, on the basis of the evidence presented, it found that in-line price to be 1 cent higher than for the preceding period. In each case, the Com-

[21] The assumption that freezing the in-line price works no injury because producers can thereafter file for an increase has a further defect which should be noted. When the Commission grants a permanent certificate at the in-line price, its practice—approved by this Court in *Callery*—is to order an immediate refund of amounts in excess of that figure which were collected during the preceding period when the producer was operating under temporary authority. If the line from which that refund obligation is measured is artificially low, the producer is, to that extent, damaged; and the damage is not remediable by prospective rate increases.

[22] The price set for the earlier period in *Sinclair* was not challenged below. The challenge to the earlier price set in *Hawkins* was rejected by the District of Columbia Circuit and has not been renewed here, except by Superior in No. 231, this Term.

mission found it necessary to reject the seaboard interests' claim that nonpermanent prices should be totally excluded from consideration. But in each case, the probative weight of these prices was substantially discounted in the manner required by the record.

1. *Amerada.* In determining the appropriate in-line price in District 4 for the period following September 28, 1960, the Commission was faced with virtually a total lack of evidence of current conditions that was not in some way "suspect." Only a small percentage of the gas contracted for in the district during the later period had been permanently certificated, *supra*, p. 11, n. 11. Unless some reference was made to nonpermanent prices, the Commission would have had no way of knowing whether the price line it found reflected the contemporaneous market. It would have in effect been relegated to conceding that no price was significant other than those the intervenors in this very case had been willing to agree to. (All other sales had been set for hearing because of intervenor protests.)

In examining the price evidence, the Commission found that the weighted average contract price of gas contracted for during the two years of the earlier period had been 16.5 cents. But for the later period, the comparable weighted contract average was 17.176 cents, or .676 cents higher (I. R. 5786).

Since the comparison was not limited to permanently certificated prices, the Commission did not rely on these averages for the establishment of any absolute in-line price level. It drew from the analysis simply the conclusion that satisfaction of the growing

interstate market in the later period had required a somewhat higher price than in the earlier years. It took as the base point the 15 cent price at which certificates had been issued for the earlier period in *Skelly Oil Co., supra.* Then, because the comparison of contract prices showed an increase of about one cent, the Commission established a 16-cent per Mcf in-line price for the later period, noting that this was the lowest price at which substantial volumes of gas had been sold (I R. 5789).

The reason for the Commission's use of nonpermanent prices in *Amerada* is plain—these prices were for all practical purposes the only available evidence of current conditions. As the Tenth Circuit said (I R. 6721), "when no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries." If the Commission is ever to be allowed to refer to nonpermanent prices, it must be in a case such as *Amerada.* Presumably, the District of Columbia Circuit would not disagree. For it did not totally reject the Tenth Circuit's decision. It said, simply, "we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to" *Sinclair* and *Hawkins* (IV R. 4312).

Assuming that it was appropriate for the Commission to give some recognition to nonpermanent prices in the context of the *Amerada* proceeding, there should be little question that the probative weight accorded such prices properly took into account the problems that inhere in the use of such data. The absolute price

level was not determined solely on the basis of the nonpermanent prices. Such prices were used mainly as a measure of the relationship of price levels during two periods of time. Once that relationship was determined, it was applied to the actual in-line prices permanently certificated for the earlier period and affirmed by the courts. By taking the relationship discerned from the nonpermanent prices, and tying it to the previously established price level accepted by the Commission and the courts, the agency in a reasonable way implemented the policy considerations that have led the courts to articulate the "suspect price" doctrine. The result, we submit, should be accepted as one that has rational basis, is reasonably adapted to the characteristics of the Section 7 proceedings, and reflects a responsible exercise of the broad powers committed to the expert judgment of the agency.

2. *Sinclair*. In dealing with the question of the proper in-line price for District 2, the Commission was again able to accept as established a 15 cent per Mcf price for the period preceding September 28, 1960. That price had been established in *Hassie Hunt Trust et al.*, 30 F.P.C. 1438, and ultimately was affirmed in the *Continental* case, *supra* (378 F. 2d 510 (C.A. 5)).

The evidence with respect to the later period had a somewhat different cast than in *Amerada*, and the Commission accordingly took a somewhat different approach. A not insubstantial volume of gas was flowing at permanently certificated prices. On the other hand, an even greater volume of gas, approxi-

mately 60 percent of the total, was flowing under temporary certificates (IV R. 4176–4178, 4181).

In reviewing a statistical analysis of the permanent and nonpermanent prices, the Commission recognized that more than 40 percent of the total volume was moving at 18 cents, although under temporary authorization. While this latter price could not have been, and was not, taken at face value, the Commission concluded, in fixing a 16 cent level, that these sales could not be ignored if current conditions were to be properly evaluated.

To be sure, the proportion of permanently certificated sales was higher than in *Amerada*. But there was at the same time substantial reason for concluding that a realistic view of the current conditions of the market required some examination of nonpermanent prices; the alternative was to ignore over half the volume of gas flowing in the market. Moreover, the Commission had reason to believe that the nonpermanent prices did in fact reflect to a degree market conditions, and were not, as the seaboard interests contended, a mere mechanical reflection of the 18 cent "guideline" ceiling previously established in the Policy Statement. Indeed, better than 25 percent of the nonpermanent volume was at prices under 18 cents (see IV R. 4178, 4181 at n. 4).

No doubt, on this evidence, a court, examining the matter *de novo,* might choose a different price line. There is room for arguing that the price line should be 15 cents, or 15.5 cents, or even as high as 18 cents. But, in the final analysis, the statute commits the decision to the expert judgment of the Com-

mission. There is adequate evidence in the record to support the 16 cent price line and the courts should therefore accept it.

3. *Hawkins.* As in the case of *Sinclair,* prior litigation had established an in-line price for sales occurring before September 28, 1960, in the District 3 area in issue in *Hawkins.* A 16 cent price was established in *Texaco Seaboard Inc.,* 29 F.P.C. 593, and *Hassie Hunt Trust et al.,* 30 F.P.C. 1438, 1441. The Commission reviewed additional evidence available to it in *Hawkins,* re-affirmed the 16 cent in-line price, and that ruling is not challenged here, except as being too low, see p. 29, n. 22, *supra.*

The evidence relating to the years after September 28, 1960, presented a third variation on the problem presented in *Amerada* and *Sinclair.* This time, the Commission was able to work with a record showing that a majority of the gas flowing under contemporaneous contracts was permanently certificated. Yet, there still was some gas—a little under 30 percent of the relevant volume—subject to temporary certificates (see III R. 1438–1440, 1447, 7295). Accordingly the Commission placed principal weight on the permanently certificated prices; referring only to such prices, the Commission found that the weighted average had risen by about one cent. In addition, over 40 percent of the permanently certificated volume for the later period was flowing at 18 cents per Mcf. On the record, the Commission concluded that a 1 cent increase in the price line was justified, from 16 to 17 cents.

The additional consideration—"some weight"—given to nonpermanent prices served to confirm the 17 cent price. Certainly this sort of limited weight given to the nonpermanent prices is not a justification for holding the 17 cent line unwarranted.

The three proceedings here are part of the Commission's ongoing attempt to follow this Court's command to aim "at keeping the general price level relatively constant pending determination of the just and reasonable rate." 382 U.S. at 228. In these and various other proceedings it has undertaken to do just that. In many of the cases it has, as here, examined evidence of nonpermanent prices.[23] The Commission's performance does not support any contention that it has disregarded this Court's instruction to keep prices stable. On the contrary the Commission's efforts have met with success. *Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 312–313. As the Ninth Circuit recently observed in approving a Commission in-line price determination (*California* v. *Federal Power Commission,* 353 F. 2d 16, 22):

> Considerable water has gone over the dam since that time [*i.e.,* the decisions in *Catco* and

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[23] *E.g., Ohio Oil Co.*, 27 F.P.C. 551, 553, affirmed *sub nom. Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A.D.C.); *Skelly Oil Co.*, 28 F.P.C. 401, 408, affirmed in relevant part *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242, 245–246 (C.A.D.C.), certiorari denied *sub nom. Prado Oil & Gas Co.* and *Skelly Oil Co.* v. *Federal Power Commission*, 377 U.S. 963; *Texaco Seaboard Inc.*, 29 F.P.C. 593, 597, 598; *Hassie Hunt Trust, et al.*, 30 F.P.C. 1438, 1444, affirmed *sub nom. Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510 (C.A. 5).

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> *UGI*], and the Commission is now, as evidenced by the opinions of the Commission in this case, fully aware of the duty that Catco imposes on it to protect the consumer. Its actions in other matters evidence the same awareness. (General Policy Statement No. 61–1, Sec. 2.56, 18 C.F.R. 2.56, amended 26 F.P.C. 661 (1961), 28 F.P.C. 441 (1962), 29 F.P.C. 590 (1963), 30 F.P.C. 1435 (1963); FPC Annual Report, 1964, p. 106). As the Commission states in its brief, after several years of its intensive efforts the national average price for gas levelled off, see FPC Ann. Rep., 1964, at 106, and even appears to have declined, see U.S. Dep't of Labor Wholesale Prices and Price Indexes. B.L.S. Commodity Code No. 0531–01.03, FPC Form No. 2. * * *

The Commission's choice of regulatory approach in achieving this result should, of course, be upheld unless it is shown to be an abuse of discretion. *E.g., Wisconsin* v. *Federal Power Commission, supra,* 373 U.S. at 302. Each of the three cases presented the Commission with a somewhat different context in which to measure evidence of nonpermanent prices; it is therefore not surprising, and indeed to be expected, that in each case the Commission had a somewhat different basis for considering such price data and in each instance made a somewhat different use of the evidence.

The sole question presented here, we contend, is whether the use of the evidence constituted an abuse of administrative discretion. To answer that question affirmatively, as did the District of Columbia Circuit, requires a conclusion that the Commission may never

use such data in "in-line" cases if it is less than conclusive evidence of what the price line is. But even the District of Columbia Circuit apparently would not have applied such a rule in *Amerada*. And neither the Ninth Circuit in *UGI* nor the District of Columbia Circuit in *Hawkins* and *Sinclair*, see p. 28, n. 20, *supra*, excluded all price evidence that might be termed "suspect". The Commission's job is to maintain reasonable control in an aspect of its regulatory activities in which there is very little, if any, evidence that admits of certain and unarguable conclusions. Pending the day when full-scale proceedings will be completed in all producing areas, the Commission, in Section 7 proceedings, must engage in a pragmatic task of appraisal and estimation, necessarily less exact in the techniques employed than those which would be used in a full-scale rate proceeding.

We suggest that there is no more reason in this kind of case than in any other—indeed, there is less reason than in most—to inhibit the appropriate application of the Commission's expert judgment by imposing firm restrictions on the type of evidence to be considered. It should suffice that the Commission in each instance had adequate support in the record for its selection or rejection of various items of evidence and appropriately discounted the probative value it attached to those nonpermanent data admitted.[24] The

[24] We recognize of course the propriety of the courts' interventions in such cases as the *UGI* case, *supra*, where the Commission did not attempt to analyze the weight given the prices there held "suspect."

record supports the decisions made here, and the Commission's price determinations should be affirmed.[25]

II. NOTHING IN THESE CASES BARRED THE EXERCISE OF THE COMMISSION'S AUTHORITY TO CONDITION PERMANENT CERTIFICATES UPON THE REFUND OF EXCESSIVE CHARGES PREVIOUSLY COLLECTED

There is a single exception to the rule that a producer may not sell natural gas in interstate commerce for resale without a certificate of public con-

[25] Superior Oil Company's contention that the 16 cent and 17 cent in-line prices determined in *Hawkins* for Texas District 3 sales are too low (Pet. in No. 231, pp. 6–8, 9–11) is based principally on the view the Commission erroneously discounted the significance of some nine 20 cent sales that had been permanently certificated in proceedings that were no longer subject to review. The Commission explained that it regarded these sales as without substantial probative value because they were certificated prior to this Court's decision in *Catco*, in proceedings in which certain of the seaboard interests had been improperly denied the right to participate (III R. 6785, 7296). The Commission noted (III R. 7296) that the failure of the seaboard interests to pursue their challenge of those certifications was due solely to a procedural technicality and in no way suggests that the 20 cent prices would have been approved on the merits in a fully contested proceeding. As the District of Columbia Circuit held (IV R. 4315–4316), the Commission is not required to perpetuate in different proceedings involving different parties a past error merely because that error was allowed to pass uncorrected at the time of its occurrence. Accord *Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510, 522 (C.A. 5), pending on petitions for certiorari, Nos. 504, 520, 526 and 628, this Term.

There is an equal lack of merit to Superior's argument (Pet. in No. 231, p. 4), not made in the court below, that the Commission erred in basing its District No. 3 in-line price determinations upon a record which included evidence of sales that had been certificated at prices of less than 14 cents per Mcf. The sales in question are permanently certificated and entitled

venience and necessity obtained from the Federal Power Commission after hearing. A producer faced with an "emergency" may obtain permission to make a "jurisdictional" sale without securing a permanent certificate of public convenience and necessity and, by the same token, without having his proposed price subjected to the scrutiny of a public hearing.

The temporary certificate is, however, precisely that—"temporary" and nothing more. Sales under it may continue only during pendency of the application for a permanent certificate. The issuance of a temporary certificate must be followed by public hearings on an application for a permanent certificate—after which the Commission will determine, *inter alia,* the in-line price consistent with the public convenience and necessity and condition any permanent certificate on compliance with that price.

Not uncommonly, the in-line price determined after a full adversary hearing is appreciably lower than the price allowed in the temporary authorization issued on the basis of the producer's *ex parte* representation of emergency. That is what happened here. By definition, then, in circumstances such as these cases present, producers have been able to collect under temporary certificates more than the public interest

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to the full weight given them. The Fifth Circuit, in *Continental, supra,* has expressly approved the inclusion of such sales in the price evidence relied upon by the Commission there. 378 F. 2d 510, 519-520. In any event, Superior did not make its present objection in its petition for rehearing to the Commission. Accordingly, Section 19(b) of the Act bars consideration of this claim. *E.g., Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 307.

(as ultimately determined) allows. The producers do not challenge the general proposition that the Commission may order refunds representing the difference between their *ex parte* prices and the in-line price. Their view, which the Tenth Circuit accepted, is that no refunds may be ordered unless the temporary certificate expressly warned of the possibility. Neither the producers nor the Tenth Circuit have explained why the producers should have such "a windfall * * * with a consequent squall for the consumers,"[26] where they are unable to show specific harm incurred in reliance upon the wording of the temporary certificate.[27] We submit that the producers are entitled to no more than an opportunity to show such a justifiable and detrimental reliance as would make a refund order inequitable—an opportunity they had here and exercised, without being able to convince the Commission of the alleged unfairness of the refunds actually ordered.[28]

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[26] *Catco*, 360 U.S. at 390.

[27] As to the wording of the temporary certificates, see p. 6, n. 2, *supra*, and pp. 42–43, *infra*.

[28] As noted above, see p. 12, n. 12, *supra*, the seaboard interests, at the start of the *Amerada* hearings, asked the Commission to add an express refund condition to the temporary certificates. In the Tenth Circuit, the producers suggested that the Commission's order denying that motion was a final, reviewable order and was thus res judicata as to the refund issue in the *Amerada* proceedings. The court disagreed, recognizing that the Commission had not then purported finally to decide the refund issue (I R. 6734–6735). This was plainly correct. The motion in question made it clear (I R. 5063) that the relief requested, *i.e.*, the imposition of an express condition in existing temporary authorization that monies thereafter collected would be subject to refund, was intended to afford consumers supplemental protection. But it plainly saved the broader contention of the seaboard interests

A. THE COMMISSION HAS THE AUTHORITY TO CONDITION PERMANENT CERTIFICATES BY REQUIRING APPROPRIATE REFUNDS EVEN THOUGH SERVICE WAS INITIATED UNDER A TEMPORARY CERTIFICATE THAT LACKED AN EXPRESS REFUND CONDITION

Section 7(e) of the Natural Gas Act authorizes the Commission to attach "reasonable terms and conditions" to its certificates of public convenience and necessity. The conditioning power is in terms unlimited; it may be invoked whenever and however "the public convenience and necessity may require." This Court has construed the power broadly in order to advance the fundamental objective of the Act—the protection of the consumer against excessive gas prices pending the determination of just and reasonable rates. *Catco, supra.* Surely, the most compelling demonstration must underlie a conclusion that the Commission may not give the public the protection of a refund of excessive amounts collected under temporary authority issued at a producer's *ex parte* behest.

There is plainly no statutory bar to refunds here. This was made clear in *United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223. This Court held that the Commission could order the refund of excess charges collected under the terms of a permanent certificate which contained no express refund obligation when, as a consequence of judicial review, the courts invalidated the price approved in that certificate as unduly high. Here, as in *Callery,* the pro-

in *Skelly*, then pending before the Commission on rehearing, that an express refund condition was not a prerequisite to refunds. The failure to seek review therefore meant at most that the distributors had decided to forgo the supplemental protection that a new condition might provide.

ducers have "sold their gas at prices exceeding those properly determined to be in the public interest." 382 U.S. at 230. That the sales here were under a temporary certificate is not, as the Tenth Circuit asserted (I R. 6736–6737), a distinguishing factor. On the contrary, there is more reason to order refunds where the excessive prices resulted from summary action on the *ex parte* "emergency" request of producers, rather than after the conclusion of an adversary proceeding. Temporary authority plainly has a lesser—not a greater—claim to the attributes of finality. Thus, the teaching of the *Callery* case—that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order" (382 U.S. at 229)—applies *a fortiori*.

Nor was the Commission's power to order refunds nullified by the failure of the temporary certificate to give the producer explicit warning that he might be required, as a condition of obtaining a permanent certificate, to refund past charges found to be excessive.[29] As noted above, temporary certificates are merely *pendente lite* authorizations intended to provide interim relief to producers who might otherwise lose gas. By definition, they are non-final and they confer no vested interest. Moreover, each temporary certificate recited expressly that it did not constitute

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[29] Sun, in opposing the grant of certiorari, mistakenly suggested that this Court believed that the producers in *Callery* had received such a warning. To be sure, the Court referred (382 U.S. at 226) to a Commission order issued on January 10, 1962, which advised producers that they might be required to make refunds with respect to the *Callery* sales. But the opinion also shows (382 U.S. at 225) that the refunds in *Callery* related back to the time service was initiated, several years before the 1962 order.

approval of any rate or charge. The Commission said, "[N]or shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding"—a disposition to be made "as the record may require" (*e.g.*, I R. 4147).[30] As the Fifth Circuit has said in rejecting the conclusion reached here by the Tenth Circuit (*Continental Oil Co.* v. *Federal Power Commission*, 378 F. 2d 510, 532, petitions for certiorari pending, Nos. 504, 520, 526 and 628, this Term):

> * * * The Producers knew that the authorizations they received were *temporary*, granted *ex parte* to provide interim relief. The contingency of the temporaries was made known to the recipients by * * * language * * * sufficient in our opinion to put the Producers on notice of the possibility that refunds of excessive amounts might ultimately be required so that no higher price might be retained than the Producer was entitled to receive under a properly conditioned permanent certificate.

The Tenth Circuit reasoned (I R. 6741) "that for the good of the public, the consumers, the distributors, the pipelines, and the producers certainty and stability are of prime importance." Stability, however, is but one factor in determining where the public interest lies and obviously cannot be made paramount on the basis of *ex parte* claims of emergency,

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[30] In eight of the sales that were involved in the review proceeding in the court below, the temporary certificates had specified a refund obligation (I R. 5358).

where "the public, the consumers, the distributors [and] the pipelines" have had no forum in which to contend for a particular level of stability. Moreover, it was not for the court of appeals to assume, as it did, the function of weighing the "protection of the consumer interests * * * against the desirability of the maintenance of an adequate supply of gas," and decide, as it also did, that a "repricing of the gas, without warning, cannot help but have a severe impact on the operations of the producers" (I R. 6735). These matters—to the extent that they are pertinent in effecting the congressional command (Section 7 (c)) to defend the public interest—are to be evaluated, at least in the first instance, by the Commission. If equities are to be weighed, the Commission is charged with management of the scales.

The Tenth Circuit, in short, has forbidden the Commission to exercise its discretion in determining how particular refunds in particular cases will affect producers and consumers. Acceptance of that result would convert temporary authorizations into limited-term permanent certificates, not subject to scrutiny in light of the public interest. Concededly, the Commission should consider whether a producer justifiably relied, to his detriment, upon the lack of an explicit refund condition in a temporary certificate issued him. There may be instances where a producer could show some irretrievable out-of-pocket expense resulting from justified reliance on the price set in the temporary certificate. But it is one thing to say that in

determining the measure of refund in a particular case equitable circumstances favoring the producer are entitled to weight; it is quite another to say that, whatever the facts and circumstances bearing upon the respective equities, the Commission is foreclosed from requiring any refund unless it has forewarned the producer in explicit terms. Neither the language nor the purpose of the statute justifies so inflexible a limitation upon the agency's discretion. The point has been convincingly stated by both the District of Columbia and Fifth Circuits in *Skelly* and *Continental* (329 F. 2d at 249; 378 F. 2d at 529):

> * * * The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

large and without particularization of the facts or the extent of their reliance.[34] They contended, for example, that their financial stability and planning for exploration required their retention of excess rates collected under their temporary certificates.[35] But, as the Commission has observed in *Skelly*, on remand, 35 F.P.C. at 853, "it is equally clear that temporary authorizations are not and could never be a vehicle for assuring such stability * * *." No rational businessman is likely to rest his financial plans on a temporary certificate that is intended to be transitory and specifically indicates that it is granted without prejudice to whatever final disposition the record ultimately might require. The producers must have known that the Commission could—and often did—find after hearing a price line below the temporary, *ex parte* charge, and that a con-

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[34] The producers also claimed total immunity from refunds because of the possibility that State regulatory agencies would not take the action necessary to see that the refunds reached the consuming public (*e.g.*, II R. 6475–6476). The Commission acted reasonably in not viewing this as a ground for relieving the producers of their refund obligation. As pointed out in *Skelly*, on remand, 35 F.P.C. at 855, the Commission can only act within its own jurisdictional reach. The distributors (*ibid.*), "are within the control of their local state regulating agencies, and it is these agencies who are responsible for seeing that the benefits of these refunds reach the proper parties." There is certainly no reason for the Commission to fail to discharge its responsibility to the consumer on the assumption that the States might not do their part.

[35] Two of the largest producers in the United States—Texaco and Humble—ordered to refund $1500 and $25,000 respectively, asserted that the effect of refunds on their budgeting and planning would be "disastrous." (II R. 6233, 6318). Standard Oil of Texas, which had the largest refund liability in *Amerada* (about $700,000), made no such argument.

sumer challenge to the prices—and a demand for refund—was probable.[36]

Surely the burden was upon the producers to demonstrate convincingly a justification for the retention of amounts exceeding the in-line rate. Whatever facts might justify that result were peculiarly within their knowledge. They made no specific showing, however, save for the unrecoverable royalties and tax payments of which the Commission took account.

Two other factors figure importantly in an appraisal of the equities. *First,* the producers obtained an immediate and substantial benefit from the grant of temporary authorizations in advance of notice and hearing: avoidance of the loss—such as the loss of gas by drainage or flaring—which prompted their applications.[37] *Secondly,* consumers have suffered a direct and measurable loss: the payment of amounts in excess of the in-line rate. From the date of issuance of

[36] The Commission has recognized exceptional circumstances when they have been adequately shown. Thus, in *Turnbull & Zoch Drilling Co.*, 36 F.P.C. at 166–167 (Opinion 499), the Commission authorized Jonnell Gas, Inc. to work out its refund obligations over a period of time to avoid the deleterious impact of a large refund upon a smaller producer. In this case, one producer respondent, Patchin-Wilmoth Industries, Inc., asked total relief from refund liability because the well in question proved less productive than expected. The Commission reasonably found the position unjustified (II R. 6429). Some small producers in this case also argued that they should be exempt as a class because of their size, a contention previously rejected in *Skelly*, on remand, 36 F.P.C. at 145.

[37] The emergencies in the present cases were for the most part economic hardship, including loss of leases, drainage, the payment of shut-in royalties, as well as two instances of flaring (I R. 4115, 4206, 4249, 4471).

the temporary certificates until the decision setting the price line, the public paid more than the "public convenience and necessity" warranted. To the extent that the consuming public is denied refunds, it will be out-of-pocket as a result of the producers' *ex parte* claims of emergency.

On this record, we submit that the refund order was reasonable—fair to the producers and in the public interest.[38]

III. THE COMMISSION'S RULING THAT THE "NEED" ISSUE SHOULD RECEIVE PLENARY CONSIDERATION IN PIPELINE PROCEEDINGS, RATHER THAN IN THESE PRODUCER CASES, WAS A REASONABLE METHOD OF CONTROLLING THE DISPATCH OF THE AGENCY'S BUSINESS

In *Hawkins* and *Sinclair*, the New York Public Service Commission opposed the issuance of permanent certificates on the ground that the producers had not established a public need for the gas in question. The argument turned on the assertion that the contractual commitments of most of the pipelines purchasing the gas here involved—their so-called "take-or-pay" positions[39]—demonstrated that there was no

[38] The Commission rejected, as this Court later did in *Callery*, 382 U.S. at 230, producer contentions that the "just and reasonable" price, yet to be determined, rather than the in-line price, was the proper measure of refunds. Interest was also imposed, a practice approved in *Callery*, *ibid.*, at the rates of 6 and 7 percent (II R. 6227), amounts expressly approved by the Fifth Circuit (*Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 157) and the District of Columbia Circuit (IV R. 4317). This Court should therefore affirm these two aspects of the Commission's order.

[39] A "take-or-pay" provision requires a pipeline, over a specified period, to take an average quantity of gas or pay for it. A

need for additional purchases. In each proceeding the Commission concluded that New York had failed to support its contention and that in any event such a claim would better be decided in dealing with pipeline proceedings (III R. 7293, IV R. 4185). The Court of Appeals for the District of Columbia Circuit held (IV R. 4298, 4301) that the Commission should have "determine[d] the issue of need *before* the initial sale to a pipeline" and "*before* [the Commission] * * * grants a permanent certificate to a producer." (Emphasis in original.)

We submit that the court of appeals has overlooked a crucial consideration—that an independent producer cannot sell gas for resale in interstate commerce unless the Commission has at some point authorized the construction of facilities that the pipeline company requires to receive the gas. Producer sales, of course, contemplate transmission of the gas to consumers through pipelines. Before the producer can begin his sales, pipeline facilities must be connected. The construction and expansion of pipeline facilities—

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make-up period is also provided during which the pipeline can take, without additional payments, the gas previously paid for but not taken. The amounts paid for gas which has not yet been taken are termed prepayments. They are capitalized and included in the pipeline rate base. In addition, if the gas paid for but not taken cannot subsequently be made up, consumers might be required to absorb the pipeline's loss on the gas not taken. Experience has shown, however, that pipelines have almost always been able to take the gas without forfeiting prepayments. The Commission recently issued a rule requiring a five-year minimum make-up period in new contracts and those certificated in various cases since 1961, which includes all in issue here. *Order No. 334*, 37 F.P.C. 110.

including the addition of connections for new purchases—are subject to the continuing regulatory supervision of the Commission. The result is that in a variety of ways—both immediate and continuing—the take-or-pay position, and all other factors affecting the needs of every pipeline, are subject to continual Commission study through proceedings and reporting requirements aimed directly at the pipelines.

The needs of the pipelines for gas are presented to the Commission in several ways. The primary method is an application by a pipeline seeking a certificate of public convenience and necessity for new or expanded transportation facilities. Such a certificate is granted only after notice and plenary consideration of many issues peculiar to pipelines, including a comprehensive study of supplies from all sources and the needs of all the pipeline's customers.[40] Another method is the annual authorization that most pipelines have—so-called "budget" authority. This allows expenditure of the lesser of $5,000,000 or 1.5 percent of the existing plant investment on new pipeline gas-purchasing facilities, without further Commission approval.[41] The

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[40] See, *e.g.*, *Transwestern Pipeline Co.*, 36 F.P.C. 176, 191–199, pending on petition for review *sub nom. Southern California Edison Co.* v. *Federal Power Commission*, C.A. 3, No. 16434; *Transcontinental Gas Pipe Line Corp.*, F.P.C. Docket No. CP65–181 (Phase II), Opinion 532, November 6, 1967. See, also, *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, upholding the Commission's refusal to certificate a pipeline project designed to make large volumes of gas available on the eastern seaboard for use as boiler fuel (see IV R. 4298, n. 22).

[41] See Regulations under the Natural Gas Act, Section 157.7(b), 18 C.F.R. 157.7(b). The total cost of any single gas purchase project cannot exceed 25 percent of the total budget amount, or $500,000, whichever is the lesser. *Ibid.*

budget authority is granted on application, and only after public notice and opportunity for objection is given.[42] The Commission also requires periodic reports from all pipelines.[43] The Commission, from its various sources, receives, on a continuing basis, necessary data about the supply and demand, and makes the information available to the public.[44]

The net of it is that the needs of all of the pipelines are subjected to a process of continuing surveillance by the Commission. Since New York has claimed that the Commission has failed to take account of the allegedly unfavorable take-or-pay situation of the pipelines, we point out further that the Commission has, since 1961, expressly conditioned permanent certificates issued to producers on acceptance of whatever rule should be established in the agency's comprehensive take-or-pay study. Such a condition was imposed here. (I R. 5795, III R. 7304, IV R. 4192.)[45]

These Commission activities give consumer interests a variety of opportunities to present their con-

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[42] *Id.* §§ 157.9 *et seq.* Annual Reports are made to the Commission describing the prior year's construction. *Id.* § 157.7(b)(3).

[43] See, *e.g.*, Regulations under the Natural Gas Act, Section 260.7, 18 C.F.R. 260.7. The Commission has stated that the information so furnished may be relied upon in support of pipeline expansions.

[44] Detailed compilations of the material furnished have been published in Federal Power Commission, "The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1963 and 1964" (February 1966); Federal Power Commission, "The Gas Supplies of Interstate Natural Gas Pipeline Companies, Calendar Years 1964 and 1965" (August 1967).

[45] See Order No. 334, discussed at pp. 50–51, n. 39, *supra*.

B. THE COMMISSION APPROPRIATELY CONCLUDED THAT EQUITABLE CONSIDERATIONS REQUIRED REFUNDS OF MOST OF THE EXCESSIVE AMOUNTS COLLECTED DURING THE PERIOD OF TEMPORARY AUTHORIZATION [31]

In its *Amerada* decision establishing in-line prices for District 4, the Commission recognized that the hearing on the permanent certificates had been conducted prior to the court of appeals holding in *Public Service Commission of New York* v. *Federal Power Commission* (*Skelly*), *supra*, that the absence of an express provision in the temporary certificate could not, as the Commission had there held, preclude the ordering of refunds if it was otherwise equitable to do so. The Commission accordingly deferred decision of the refund question to allow the parties further opportunity for briefing, with the decision to turn on the "standard of equity * * *" (I R. 5792).

After full briefing, the Commission determined that the producers should be exempted from making refunds only to the extent to which unrecoverable ex-

[31] Because the Tenth Circuit held that the Commission had no authority to require refunds, the court did not consider the producers' further objections that the refund requirement actually imposed by the Commission in Opinion 501 was not reasonable. In our petition in No. 80 (p. 4, n. 1) we expressly reserved the right to argue this question so that the Court would be in a position to decide the entire case. We submit that the circumstances of the present case warrant this Court's resolution of this issue at the present time, without remand to the court below for initial consideration. Compare *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 226–227; *Federal Power Commission* v. *Southern Cal. Edison Co.*, 376 U.S. 205; *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 114.

penditures could be said to have been made because of their assumption, made in light of the Commission's previous holdings, that no refunds would be ordered. The Commission accepted the factual "statements of the producers in their briefs * * * at face value" (II R. 6227) for the purpose of deciding whether such expenditures had occurred. See also *Skelly*, on remand, 36 F.P.C. 143, 144.[32] Even so, the only such expenditures were royalty payments and some Texas production taxes. As a consequence, the Commission ordered a refund on all collections above the 16 cents per Mcf in-line price, with the exception of royalties and production taxes paid prior to February 1, 1964.[33]

Apart from these two items—royalties and production taxes—the producers claimed detriment, in the

[32] Although *Amerada* is the first Commission order requiring refunds for sales under such temporaries to reach this Court, the principle was first applied about two months earlier in the Commission's order on remand of *Skelly* from the District of Columbia Circuit. See *Skelly Oil Co.*, 35 F.P.C. 849 (Commission Opinion 492), rehearing denied, 36 F.P.C. 143, pending on review, C.A. 10, Nos. 9000, *et al.* Refund obligations have also been imposed in such circumstances in *H. L. Hawkins*, 36 F.P.C. 149 (Opinion 498), rehearing denied, 36 F.P.C. 981, pending on review, C.A. 10, Nos. 9220, *et al.*; and in *Turnbull & Zoch Drilling Co.*, 36 F.P.C. 164 (Opinion 499), pending on rehearing before the Commission.

[33] The Commission concluded that producers would have to refund monies representing royalties or State production taxes paid after February 1, 1964, because this date was one week after the court of appeals' decision in *Skelly* that refunds might be ordered absent an express condition. The Commission's view (II R. 6226, 6427–6428) was that no producer could thereafter reasonably have relied on a belief that refunds might not be ordered. See, also, *H. L. Hawkins*, 36 F.P.C. at 152.

tentions, and all the evidence they command, in circumstances that allow examination of the overall supplies of individual pipelines. The New York Commission in fact participated in two pipeline cases growing out of the producer applications in issue here.

In one instance, the application for intervention was first denied for want of standing, since it involved gas destined for Florida markets. See *Coastal Transmission Corp.*, 23 F.P.C. 752. After the District of Columbia Circuit reversed,[46] and intervention was allowed,[47] New York made no objection to the grant of a certificate to the pipeline.

In the other case, the Commission found that United Gas Pipe Line Co., the pipeline purchaser of the gas sold to Lone Star Gathering Company in the *Sinclair* proceeding, had the requisite need. *Lone Star Gas Co.*, 36 F.P.C. 497, 501, 502. Subsequently, on rehearing granted to re-examine the need issue, the Commission allowed Lone Star and its 17 suppliers to abandon the sales—not because of a lack of need, but because the producers' reserves proved inadequate. See *Lone Star Gas Co., et al.*, Docket Nos. CP65–118, *et al.*, order issued September 15, 1967; *Logue and Patterson, et al.*, Docket Nos. CI67–1231, *et al.*, order issued September 15, 1967. See also *Lone Star Gas Co., et al.*, Docket Nos. CP65–118, *et al.*, order issued October 30, 1967.

Moreover, in both *Sinclair* and *Hawkins* the New York Commission was afforded the opportunity to

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[46] *Public Serv. Com'n of State of N.Y.* v. *Federal Power Commission*, 295 F. 2d 140, certiorari denied *sub nom. Shell Oil Co.* v. *Federal Power Commission*, 368 U.S. 948.

[47] *Coastal Transmission Corp.*, 26 F.P.C. 531.

present evidence of a lack of need to the hearing examiner. In both proceedings it failed to persuade either the examiner or the Power Commission of the validity of its contention. We disagree with the suggestion of the District of Columbia Circuit that the failure of the New York Commission to mount a persuasive case (and the court does not suggest it did) is excused by the Power Commission's not having given more extensive consideration to the question. Substantial information about each pipeline's take-or-pay situation, and its overall supplies and sales, were publicly available. The Commission, moreover, has made very clear its familiarity with and consideration of these data (III R. 7293): "[B]ecause of the nature of the gas business and the obligation of pipeline companies to the consuming public, it is to be expected that such companies will occasionally have long-term contracts for supplies which will give them gas for [the] future, even though the supplies may be slightly in excess of their present-day needs." At no point has New York offered any factual basis for finding error in this conclusion.

Thus, the Commission procedure differs from the prescription of the District of Columbia Circuit only in that the agency characteristically makes its primary determination of need in pipeline rather than in producer proceedings. Theoretically, the Commission could have given the question of pipeline need a plenary hearing in each of the producer proceedings now before the Court. However, since the pipelines invariably obtain their gas from large numbers of

producers, determination of their needs must take into account the gas supply and prospective purchases from many sources. To make this an issue in connection with the application of each seller is to invite duplication of effort and multiplication of parties. As the Fifth Circuit pointed out in *Continental Oil Co.* v. *Federal Power Commission, supra,* in refusing to follow the holding of the District of Columbia Circuit here (378 F. 2d at 526):

> Where there are hundreds of producers in § 7 proceedings who cannot have any knowledge of ultimate demand, the result would be either a forced intervention of the pipelines and prolongation of the hearings, or possible collateral attack on the pipeline certificate cases. * * *

With some awareness of these difficulties, the District of Columbia Circuit suggested that the Commission's consideration of need in producer cases need not be detailed and could be based on "studies of its staff" or broad "policy statements." (IV R. 4301). Perhaps that largely removes the sting of the decision. But, if so, it remains difficult to see the substantive gain in protection of consumer interests. The abbreviated study or statement of the purchasers as to need would relate to a subject necessarily considered in greater detail—under the Commission's existing rules—in connection with the pipeline's application for authority to construct facilities for taking additional gas. Such approval is an essential prerequisite to permanent consummation of the sales at issue in the producer proceedings. The Commission, in addition, constantly reviews the supplies of and the de-

mands upon pipelines, since experience has taught that need is a dynamic and not a static question. This being so, we submit that the Commission's approach should be sustained as a reasonable exercise of it discretionary control of its proceedings.

CONCLUSION

The judgments of the Courts of Appeals for the Tenth and District of Columbia Circuits should be reversed, with directions to affirm the orders of the Federal Power Commission.

Respectfully submitted.

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